IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRED GENTNER AND ROBERT STEVENSON, Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 94-7443
CHEYNEY UNIVERSITY OF PENNSYLVANIA, Defendant.	:	

MEMORANDUM

R.F. KELLY, J. NOVEMBER 1, 1999

Before this Court is Plaintiffs' Motion for Attorney's Fees and Costs. The above-captioned matter is a civil rights action brought by two former science professors who claimed that they were constructively discharged as a result of speaking out against Defendant's hiring practices in violation of 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3 ("Title VII"). This case was tried to a jury on two separate occasions. Both trials resulted in favorable verdicts for both Plaintiffs. Now, Plaintiffs seek an award of attorney's fees in the amount of $448,624.75, pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, and the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), which both authorize district courts to award prevailing parties in civil rights cases a reasonable attorney's fee. See Cerva v. E.B.R. Enterprises, 740 F. Supp. 1099, 1102 (E.D. Pa. 1996)

("Section 1988 provides that `the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs' for actions brought under section 1983."); Nissim v. McNeil Consumer Products Co., 957 F. Supp. 604, 606 (E.D. Pa. 1997) ("Title VII allows for an award of attorneys' fees to the `prevailing party.'"); see also Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1183 n.16 (2d Cir. 1996) (standards set forth by Supreme Court for awards of attorneys fees apply equally under the Civil Rights Attorney's Awards Act of 1976 and Title VII). For the following reasons, Plaintiffs' Motion will be granted in part and denied in part.

STANDARD OF REVIEW

The party seeking attorney's fees must show that (1) he is a prevailing party; and (2) the fee request is reasonable. Schofield v. Trustees of University of Pennsylvania, 919 F. Supp. 821, 825 (E.D. Pa. 1996). "A plaintiff `prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar v. Hobby, 506 U.S. 103, 111-112 (1992). In other words, the plaintiff prevails if he succeeds on any significant issue in litigation which achieves some of the benefit the party sought in bringing suit. Schofield, 919 F. Supp. at 826-27 (citing Hensley v. Eckerhart, 461 U.S. 424, 429 (1983)).

The burden is on the party seeking the attorney's fees to demonstrate that his request is reasonable, and, thus, evidence must be submitted to support assertions regarding the number of hours expended and the rates claimed. Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). The opposing party then has the burden to challenge, with specificity, the reasonableness of the request.[1] Id.

In determining the amount of time reasonably spent, "the court should deduct hours from the calculation if they are `excessive, redundant, or otherwise unnecessary.'" Schofield, 919 F. Supp. at 826. As for whether hourly rates are reasonable, the court must assess the skill and experience of the prevailing party's attorney, and compare the rates requested with rates for similar legal services prevailing in the same community for lawyers of like experience, reputation and ability. Id. Then, the court multiplies the two factors to reach the lodestar, which is the presumed reasonable fee. Id. Once this calculation is obtained the district court has the power to adjust the lodestar if it determines that the amount is not reasonable in light of the results obtained. Id. at 826-27.

DISCUSSION

[1] "While it is not permitted to reduce the requested amount based upon a factor not raised by the opposing party, the court possesses considerable discretion in fixing the fee amount in light of the objections." Schofield, 919 F. Supp. at 826.

Because the second trial of this matter solely pertained to allegations of retaliation under Title VII, Cheyney first contends that Plaintiffs are not entitled to attorneys' fees under 42 U.S.C. § 2000e-5(k) for that trial, since Congress omitted a reference to retaliation claims under 42 U.S.C. § 2000e-3 when it amended 42 U.S.C. § 2000e-5(g)(2)(B). Section 2000e-5(g)(2)(B) provides as follows:

> On a claim in which an individual proves a violation under section 2000e-2(m)[2] of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court --
>
> (I) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title . . . .

Relying on the above statute, along with McNutt v. Board of Trustee of Univ. of Ill., 141 F.3d 706 (7th Cir. 1998), and Woodson v. Scott Paper Co., 109 F.3d 913, 932-935 (3d Cir. 1997) cert. denied, 118 S. Ct. 299 (1997), Cheyney claims that attorney's fees are not recoverable for a retaliation claim under Title VII. Yet, as Plaintiffs point out, a review of the above

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[2] Section 2000e-2(m) states that "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

merely shows that there is no provision for attorney's fees in mixed-motive retaliation cases.

In McNutt, a carpenter employed by the University of Illinois brought a Title VII action alleging that university officials gave him job assignments based on impermissible retaliatory and racially discriminatory motives. The district court awarded injunctive relief, attorney fees, and costs to the plaintiff-employee. On appeal, the Seventh Circuit held that the Civil Rights Act of 1991 does not permit injunctive relief and an award of attorney fees and/or costs in a mixed-motive retaliation case. McNutt, 141 F.3d at 709. The appeals court reasoned that because the plaintiff did not prove a violation of § 2000e-2(m), he was not entitled to any of the remedies at issue, including attorney's fees.[3]

In Woodson, an African-American male claimed that he was a victim of unlawful racial discrimination and retaliation in violation of Title VII. The jury found for the defendant on the discrimination claims, but for the plaintiff on the retaliation claims, and made a large damages award. On appeal, the defendant

[3] The Seventh Circuit found that "[d]iscrimination based on retaliation -- prohibited separately by § 2000e-3(a) -- is conspicuously absent from the list of protected categories in § 2000e-2(m). McNutt, 141 F.3d at 709. Thus, in order to prove a Title VII violation (and thereby recover any relief) based on retaliation, plaintiffs are still required to establish that the alleged discrimination was the "but for" cause of a disputed employment action. Id.

contended that the district court erred in instructing the jury that it could hold the defendant liable under Title VII for retaliation if the plaintiff's filing of complaints with the EEOC and the PHRC was a "motivating factor" in the decision to discharge him. 109 F.3d at 931. According to the defendant, the jury should have been instructed that, to find defendant liable, retaliatory animus must also have had a "determinative effect" on the plaintiff's termination. Id. at 931-32. The Third Circuit Court of Appeals agreed, holding that the district court abused its discretion in failing to instruct the jury that improper motive must have had a determinative effect on the decision to fire the plaintiff in that case, as required in Miller v. CIGNA Corp., 47 F.3d 586 (3d Cir. 1995).[4] Id. In doing so, the Third Circuit determined that there is no reference in § 107 of the 1991 Civil Rights Act, 42 U.S.C. § 2000e-5(g)(2)(B) to either retaliation claims in general or § 2000e-3 in particular, suggesting, by its plain meaning, that Congress intended that § 107 not apply to retaliation claims. Id. at 933-35. Based on the above, the federal appeals court concluded that "§ 2000e-3 claims of illicit retaliation are governed by the `determinative

[4] In Miller, "[the Third Circuit] clarified the standard that should be used in pretext cases, holding that a district court must instruct a jury that the plaintiff's burden is to prove that an impermissible factor `played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process.'" 109 F.3d at 932.

effect' standard and Miller." Id. In further support of its holding, the Third Circuit recognized that "[b]ecause Congress dealt with retaliation claims elsewhere in the 1991 Act, but not in § 107, it would seem reasonable to assume that § 107 does not apply to retaliation claims." Id. at 934.

Plaintiffs characterize McNutt and Woodson as mixed-motive retaliation cases where the plaintiffs only proved retaliation with no discrimination. Plaintiffs argue that the instant action is distinguishable in that Plaintiffs were required to and did prove both discrimination along with retaliation. Pls.' Reply Brief at 1-2.

Plaintiffs are correct. Indeed, during the second trial of this matter, this Court instructed the jury that in order for Cheyney to be held liable under Title VII, Plaintiffs had to show as part of their prima facie case that intolerable conditions of discrimination were present: "That is that Cheyney knowingly permitted conditions of discrimination so severe or pervasive that a reasonable person subjected to them would foreseeably resign." (N.T., dated 9/23/98, at 11). Moreover, Plaintiffs provided ample evidence of retaliatory animus on the part of individual defendants, Drs. Jones and Chang, so that the jury could reasonably infer that Gentner and Stevenson were being discriminated against because they objected to the way in which Cheyney's faculty searches were being manipulated to favor

minority candidates. See Gentner v. Cheyney University, Civ. A. No. 94-7443, 1999 WL 820864 (E.D. Pa. Oct. 14, 1999). Under such circumstances, where the successful retaliatory discharge claim could not have been tried effectively without reviewing and analyzing the facts that led to the underlying discrimination charge, an award of attorney's fees is appropriate. See Merriweather v. Family Dollar Stores, 103 F.3d 576, 583-84 (7th Cir. 1996) (affirming award of attorney's fees based on district court's finding that the successful claim for retaliatory discharge could not have been tried effectively without reviewing and analyzing the facts that led to the underlying discrimination charge).

Next, Defendant generally contends that "plaintiffs have failed to maintain and submit adequate time records and other supporting documentation of the nature and the time expended on specific services in the case which prevents this Court from being able to determine with reasonable certainty whether particular claimed hours are excessive, duplicative or expended on unsuccessful claims." Def.'s Resp. at 3. In this regard, the Third Circuit Court of Appeals has explained that the degree of specificity of records required to support a request for attorney's fees is "`some fairly definite information as to the hours devoted to various general activities.'" Stover v. Riley, 30 F. Supp.2d 501, 504 (E.D. Pa. 1998) (quoting Pawlak v.

Greenawalt, 713 F.2d 972, 978 (3d Cir. 1983) and Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973)). "It is not necessary to know the specific amount of time devoted to precise activities." Stover, 30 F. Supp.2d at 504. Rather, the focus of a district court's inquiry is on whether or not the supporting records are specific enough to make a determination regarding the reasonableness of the claimed fees.[5] Id. In the instant action, a review of the time records submitted by Plaintiffs' attorneys shows that the fee schedules at issue appear to comply with the standards set forth by Third Circuit case law.

Cheyney also argues that "[b]ecause of the dearth of any evidence of the professional qualifications of any counsel other than Mr. Frost or of the market rate applicable to them, any request for attorneys' fees on behalf of counsel other than Mr. Frost must be denied because Plaintiffs' counsel has wholly failed to meet their requisite burden of proof." Def.'s Resp. at 5-6. Cheyney adds that "[t]he affidavits submitted by David Rudovsky, Esquire do not provide required information regarding hourly rates customarily charged in the relevant market" and,

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[5] When contesting the time records in a fee petition, "the challenger must `specify with particularity the reasons for its challenge and the category (or categories) of work being challenged,' but `need not point to each individual excessive entry.'" Rush v. Scott Specialty Gases, 934 F. Supp. 152, 154 (E.D. Pa. 1996).

thus, “are insufficient to satisfy the applicants’ burden to show that the requested rates are in line with those prevailing in the community for similar services.” Def.’s Resp. at 6 (citing Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984)).

In response, Plaintiffs argue that “[a] review of the affidavit of David Rudovsky, Esquire, reveals that Mr. Rudovsky has opined that the hourly rates requested by all of plaintiffs’ attorneys in this matter are `fair and reasonable with respect to services rendered’” -- which, according to Plaintiffs, presumes that the rates requested are prevailing market rates. Pls.’ Reply at 4-5. Further, Plaintiffs have submitted a revised affidavit by Mr. Rudovsky as well as supplemental affidavits of Gregg Zeff, Esquire and Josephine Carabello Patti, Esquire.

The prevailing party has the burden of proving, by the submission of affidavits of attorneys with personal knowledge of the hourly rates customarily charged in the relevant market, that the rate requested is the prevailing market rate. The supporting affidavits, however, may be designated insufficient if they (1) fail to take into account the differences among types of civil rights cases, (2) fail to assign different rates to different tasks, or at least derive a “blended” rate, depending upon the complexity of the task performed by counsel, or (3) are merely supported by conclusory statements. Becker v. Arco Chemical Co., 15 F. Supp.2d 621, 629-30 (E.D. Pa. 1998). In determining

whether the prevailing party has made out a prima facie case with regard to the appropriate fee for legal services rendered, "a court may not sua sponte reduce the amount of the award when the defendant has not specifically taken issue with the amount of time spent or the billing rate, either by filing affidavits, or, in most cases, by raising arguments with specificity and clarity in briefs (or answering motion papers)." Bell v. United Princeton Properties, 884 F.2d 713, 720 (3d Cir. 1989). When, however, the challenger seeks to raise a factual issue, opposing affidavits must be introduced averring the facts upon which the challenge is based. Id.

In the case at hand, Cheyney is correct in that Plaintiffs initially filed a supporting affidavit by Mr. Rudovsky that was deficient. However, Plaintiffs supplemented the record with revised and supplemental affidavits that have supplied the information which Cheyney found to be lacking in Plaintiffs' initial proffer. Because Cheyney has submitted no evidence to refute the averments made in the affidavits submitted by Plaintiffs, this Court finds that Plaintiffs have made out their prima facie case with regard to appropriate hourly rates on which to base their attorneys' fees for work done on this case by Mr. Frost, Mr. Zeff and Ms. Patti.[6] See Ballen v. Martin Chevrolet-

[6] It is worth noting that Plaintiffs did not submit affidavits documenting the experience of George R. Szymanski, Jr., Esquire, or Stuart Ingram, a law clerk employed at

Buick, No. CIV. A. 94-484, 1998 WL 1013874, *2 (D. Del. Sept. 17, 1998) (citing Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996) (district court should not adjust the requested rate downward when "the plaintiff has met his prima facie burden under the `community market rate' lodestar test, and the opposing party has not produced contradictory evidence . . . .")).

Next, Cheyney argues that documentation submitted by Plaintiffs' attorneys reveals that there has been duplicative effort by multiple attorneys on several occasions and that their requests for reimbursement should be limited to one attorney. Def.'s Resp. at 6-7 (citing Rode, 892 F.2d at 1187-88). Defendant makes these charges with regard to the following duplicative tasks recorded by counsel for Plaintiffs:

(1) Meeting with clients on June 18, 1994 (2.2 hours);

(2) Meeting with clients to discuss complaint on November 4, 1994 (2.5 hours);

(3) Review of documents on February 14, 1995 (10.3 hours);

(4) Conference re: dismissal of grievances (3 attorneys) on April 8, 1995 (1 hour);

(5) Duplicate entries for letter to Wiley on May 10, 1995 by Mark Frost (0.4 hour);

(6) Multiple and duplicative entries on June 12, 1995;

Plaintiffs' law firm. As a result, this Court will deny the instant application for fees to reimburse Plaintiffs' counsel for their work on this case.

(7) Two attorneys at June 19, 1995 Deposition of Dr. Jones (6.5 hours);

(8) Two attorneys at June 20, 1995 Deposition of Dr. Jones (12 hours);

(9) Two attorneys at June 22, 1995 Deposition of Dr. Faulk (8.2 hours);

(10) Duplicate entry regarding June 26, 1995 Deposition of Dr. Stevenson by Gregg Zeff (7 hours);

(11) Two attorneys at June 27, 1995 Deposition of Dr. Jones (4 hours);

(12) Two attorneys at June 28, 1995 Deposition of Dr. Hoffman (6 hours);

(13) Two attorneys at August 16, 1995 Deposition of Dr. Faulk (2 hours);

(14) Two attorneys at August 23, 1995 Deposition of Mr. Hegamin (4.5 hours);

(15) Two attorneys at October 10, 1995 Deposition of Dr. Jones (1.5 hours);

(16) Three attorneys at oral argument of November 7, 1997 (2 hours).

In addition to limiting the above requests for reimbursement to one attorney, Defendant asks this Court to consider whether excessive and duplicative time was claimed by Plaintiffs in using a “second chair” attorney at the first trial of this case. Def.’s Resp. at 6-7.

In response, Plaintiffs list the following reasons as to why they employed two attorneys at some depositions and all court proceedings: (1) this matter has a complicated legal and factual history; (2) the parties submitted over 350 premarked

exhibits for trial, and exchanged many times that number of documents in pretrial proceedings; and (3) various witnesses in this matter spent a great deal of time during discovery being evasive in their testimony at depositions and not forthright in producing documents, which required a second set of eyes and ears to review documents prior, during and after depositions. Plaintiffs add that defendants in this case always had two attorneys and a paralegal present at trial and that, based on defendant's records, eleven attorneys have worked on this case for the defense. Furthermore, Plaintiffs point out that "[n]ot only did Gregg L. Zeff, Esquire, second chair both trials, he participated in all aspects of the arguments and shared the direct and cross-examination of many key witnesses." Pls.' Reply at 9. Zeff also took many of the depositions. Id. Thus, according to Plaintiffs, "[i]t is only as a result of the experience of plaintiffs' counsel that only two attorneys were needed." Id.

"[P]revailing parties are not barred as a matter of law from receiving fees for sending a second attorney to depositions or an extra lawyer into court to observe and assist." New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136 (2d Cir. 1983). Indeed, the use of a second attorney "may be essential for planning strategy, eliciting testimony or evaluating facts or law." Williamsburg Fair Housing Comm. v.

Ross-Rodney Housing Corp., 599 F. Supp. 509, 518 (S.D.N.Y. 1984). However, a district court may find the hours spent by an attorney who engaged in duplicative, non-trial related work to be unnecessary and, thus, non-reimbursable. See Becker, 15 F. Supp.2d at 633 (court concluded that certain hours expended by plaintiff's attorneys were excessive, redundant and/or partially unnecessary, and therefore, reduced them by 50%).

In the instant action, Plaintiffs are correct in that this case did involve complicated facts and legal complexities which justified the utilization of two attorneys at trial.[7] The fact that Defendants used one attorney at the first trial is inconsequential, especially in light of the fact that Defendant Cheyney used two attorneys and a paralegal at the second trial.[8] As for the non-trial related claims, this Court concludes that Plaintiffs were justified in having two attorneys present during the deposition of Dr. Jones, since Plaintiffs' concerns about his

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[7] Because this Court finds that Plaintiffs acted reasonably in having two attorneys at trial, it follows that both attorneys needed to prepare for direct and cross-examination of witnesses as well as arguments on motions in limine. Thus, the hours recorded on the fee schedule labeled as trial preparation were appropriately listed by both Mr. Frost and Mr. Zeff.

[8] At the oral argument, held on November 7, 1997, Plaintiffs were represented by Frost and Zeff. Both argued on behalf of Plaintiffs' position that subject matter jurisdiction was present in opposition to the two attorneys present for defendants. However, Josephine Carabello Patti, Esq. was not present at this argument and, thus, her time will be deducted accordingly. (N.T., dated 11/7/97, at 2).

testimony were well-founded. Likewise, the review of numerous documents that were supplied during the discovery phase of this litigation and were prepared for depositions and trial were understandably reviewed by more than one attorney. However, this Court finds that the use of multiple attorneys by Plaintiffs for the other depositions and non-trial tasks were unnecessary and, therefore, fifty-percent (50%) of these charges will be deducted from Plaintiffs' fee claim.[9]

Defendant also contends that although Plaintiffs aver in their submitted affidavits that their experience in civil rights law allows them to do legal research and preparation of pleadings in an expedited fashion, the time reflected on the fee schedule filed by Plaintiffs' attorneys shows duplicative and excessive entries. In this regard, Defendant points to the following specific requests by Plaintiffs:

(1) June 20, 1994 Legal Research Entry JCP (4.2 hours);

(2) Multiple entries for drafting of complaint by JCP from October 17, 1994 through October 25, 1994 (6.5 hours); preparation of amended complaint on February 8-9, 1995 by JCP (1.5 hours);

(3) Multiple entries for preparation of subpoenas by Mr. Zeff on December 4, 1995 (6 x .25 = 1.5 hours);

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[9] The conference regarding the dismissal of grievances, held on April 8, 1995, is a reasonable means by which the attorneys for Plaintiffs would meet to form a strategy regarding the case at hand. Such a conference could not take place without the attorneys gathering together to share information and suggested forms of action. Thus, this hour of time is reasonably accounted for by Plaintiffs' counsel and will be reimbursed.

(4) Multiple entries for preparation of subpoenas by Mr. Zeff on January 4, 1996 (4 x .25 = 1 hour);

(5) Multiple entries concerning legal research of First Amendment and Title VII issues on November 21, 1995 by JCP (5 hours) and April 4, 1996 by JCP (also 5 hours); and

(6) Entries for a superfluous appeal to the Third Circuit in January and February, 1997 by Mr. Zeff (.65 hours).

First, with regard to the June 20, 1994 research entry, Plaintiffs clarify that the actual entry reads as follows:

> 6/20/94 Legal research; RE: Is arbitration mandatory before bringing an action into court directly

Plaintiffs argue that the issue of whether or not Gentner and Stevenson had to arbitrate various grievances before appearing in Federal Court was a major issue researched extensively by Plaintiffs' law firm. Plaintiffs add that, when the research was done, the above issue was also in dispute in various circuits and the Supreme Court. Based on the above, this Court finds that the time charged by Plaintiffs' attorneys was reasonable.

Next, with regard to the complaints in this matter, Plaintiffs state that the original Complaint consisted of thirty-two pages and one hundred forty-three paragraphs in length. Plaintiffs contend that the Complaint and Amended Complaint not only were essential documents for this case, but played a crucial role in determining who was Plaintiffs' employer. Plaintiffs are correct in that eight hours attributed to working on the above

pleadings is fair and reasonable.

Plaintiffs also contend that the multiple entries for preparation of subpoenas by Mr. Zeff in December of 1995 and January of 1996 are reasonable. A review of the entries challenged by Defendant shows that Mr. Zeff actually "[p]repared subpoenas to Harding Faulk, Fred Tucker, William Hegamin, Connie Sivieri, Tom Anderson, and Cover letter for subpoenas." This Court finds that taking one-quarter of an hour to prepare each subpoena was reasonable.

As for the multiple entries concerning research of First Amendment and Title VII issues in November of 1995 and April of 1996 totaling 10 hours, Plaintiffs contend that each research session was reasonable and necessary in order to, first, prepare a memorandum regarding various causes of action which Plaintiffs could or could not have recovered for in this matter and, later, to update and expand the research. As stated above, this action did involve legal complexities that required a thorough knowledge of civil rights law that even an experienced attorney would need to review and update with evolving case law.

Finally, with respect to an appeal brought before the Third Circuit in January and February of 1997, Plaintiffs point out that Defendant's criticism of this appeal is unfounded when considering the minimal time billed. Furthermore, Plaintiffs remind this Court that Plaintiffs' motion to have the verdict

from the first trial certified for appeal was granted. Because Plaintiffs' attorney expended only a limited amount of time on seeking appellate review of the first trial, an avenue that was reasonably explored and followed through by Mr. Zeff, this Court concludes that the fees for the time involved are recoverable.

EXPERT WITNESS FEES AND OTHER COSTS

Plaintiffs also seek an award of certain costs. As with the Plaintiffs' fee request, Defendant objects on the grounds that Plaintiffs' request for costs is procedurally and substantively defective. More specifically, Defendant argues that (1) Plaintiffs seek the recovery of certain costs which are not recoverable, (2) Plaintiffs seek the recovery of certain expenses at an excessive rate of reimbursement, and (3) Plaintiffs have failed to submit appropriate substantiation and documentation for certain of their purported costs.

First, Defendant contends that Plaintiffs are not entitled to recover costs associated with the reports prepared by Bunin Associates, Plaintiffs' economic experts, which were prepared for the first trial. These costs included 2 reports at $900.00 each, for a total of $1,800.00. According to Defendant such costs are not recoverable as part of "reasonable attorney's fees" under Section 1988. Def.'s Resp. at 10. Defendant also challenges the $2,300.00 in costs of expert testimony for Bunin Associates at the second trial. Id. Defendant asserts that

Plaintiffs have not supplied any documentation or support for such requests.[10] Id.

In West Virginia Hospitals, Inc. v. Casey, 499 U.S. 83 (1991), the Supreme Court of the United States held that "[f]ees for services rendered by experts in civil rights litigation may not be shifted to the losing party as part of a `reasonable attorney's fee' under § 1988." But 42 U.S.C. §§ 1988 was amended in 1991 to allow prevailing parties of a § 1983 civil action to recover expert witness fees as part of the attorney's fee:

> **(b) Attorney's fees**
> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.
> **(c) Expert fee**
> In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion may include expert fees as part of the attorney's fee.

42 U.S.C. § 1988(b) & (c). As shown above, however, section 1988's amendment did not make expert fees recoverable as part of the attorney's fee in a § 1983 lawsuit.

Section 2000e-5(k) also was amended in 1991. With

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[10] Attached to Plaintiffs' Reply Brief is Mr. Zeff's affidavit, which attests to the reasonableness of Bunin & Associates' charges and fees. See Zeff Aff. (Ex. C to Pls.' Reply) at ¶ 17; see also N.T., dated 9/18/98, at 22-23.

respect to the allowable amount taxable as costs to the prevailing parties in actions to enforce rights under Title VII of the Civil Rights Act of 1964, the amendment to § 2000e-5(k) expanded the reasonable attorney's fee to include expert fees as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k).

Because in this case the claims asserted by Plaintiffs included claims under Title VII and § 1983, the recovery by Plaintiffs is governed by 42 U.S.C. § 2000e-5(k) and 42 U.S.C. § 1988. See Scott v. Bell Atlantic Corp., No. CIV. A. 93-5970, 1996 WL 608472, *2 (E.D. Pa. Oct 24, 1996). Here, Plaintiffs' Title VII claim was presented to the jury in both trials. As such, Plaintiffs are correct in arguing that this Court may exercise its discretion and grant an award of expert witness fees for both trials. Id. Furthermore, this Court finds Plaintiffs' request for expert fees to be reasonable.

Plaintiffs also seek an enhancement of their fees. Plaintiffs contend that they should receive an upward adjustment or multiplier because there were few attorneys willing to take this difficult case and because of the delay of over three years

from the filing of the Complaint.[11] In doing so, Plaintiffs assert that Defendants have significantly delayed these proceedings to Plaintiffs' detriment. Plaintiffs further state that defendants were unwilling to settle this matter.

The Third Circuit Court of Appeals has set forth the following standard for awarding a contingency multiplier:

> "The purpose of the contingency multiplier is to compensate counsel for the riskiness of undertaking the litigation." The fee applicant has a significant burden to carry to obtain a contingency multiplier. Contingency multipliers will be granted only in rare cases. In order to obtain a contingency multiplier, the applicant must establish: (1) how the market treats contingency fee cases as a class differently from hourly fee cases; (2) the degree to which the relevant market compensates for contingency; (3) that the amount determined by the market to compensate for contingency is not more than would be necessary to attract competent counsel both in the relevant market and in this case; (4) "that without an adjustment for risk the prevailing party `would have faced substantial difficulties in finding counsel in the local or other relevant market.'"

Rode, 892 F.2d at 1184 (citations omitted).

Defendant argues that the affidavits submitted by Plaintiffs are devoid of any reference to the market, and, thus, Plaintiffs have failed to meet their burden of showing that a

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[11] "Because a standard commercial fee would normally be paid over time, in order to be made whole, the lump sum payment should take into account interest, inflation, and opportunity costs." Cerva, 740 F. Supp. at 1106-07 (citing Missouri v. Jenkins By Agyei, 491 U.S. 274, 283-84 (1989)).

contingency enhancement is appropriate. See Def.'s Resp. at 13. Likewise, Defendant states that Plaintiffs have failed to point to specific costs incurred as a result of any delay. Id. at 13-14 (citing Gulfstream III Assocs. v. Gulfstream Aerospace Corp., 995 F.2d 414, 425 (3d Cir. 1993)).

Defendant is correct in that Plaintiffs have not met their burden of justifying a contingency multiplier in this case. "This burden can be met through an economic study setting up how hourly rates relate to contingency compensation or a thorough market-based survey of local fee arrangements." Cerva, 740 F. Supp. at 1106. Here, however, Plaintiffs have failed to provide this Court with such evidence to support a contingency multiplier. Accordingly, Plaintiffs' request for this multiplier will be denied.

With regard to the policy behind compensating Plaintiffs' counsel for delay, the Third Circuit has stated the following:

> The rationale for allowing the adjustment [for delay], that "payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime," applies regardless of the form of the court's judgment and whether or not the party's success was complete or partial.

Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 922 (3d Cir. 1985). "At a minimum, such a showing should include evidence of the prevailing market rates for

interest and the attorney's services over the period of the litigation." Cerva, 740 F. Supp. at 1107.

Although it is true that Plaintiffs and their counsel have endured a long wait for the resolution of this matter, Plaintiffs have contributed to this delay by failing to present their theory of liability during the first trial in a coherent manner. See Gentner v. Cheyney University, No. CIV. A. 94-7443, 1997 WL 529058, *3 (E.D. Pa. Aug. 25, 1997) ("During the previous trial, Plaintiffs did not clarify what Title VII theory their cause of action was operating under, and, in doing so, they have confused this Court and added to their own burden."). Moreover, with no factual showing regarding any detriment suffered by Plaintiffs' counsel because of the delay, this Court finds that such a multiplier is inappropriate. See Fletcher v. O'Donnell, 729 F. Supp. 422, 433-34 (E.D. Pa. 1990) ("Such a multiplier is inappropriate because the applicant has made no factual showing about any detriment suffered by counsel because of the delay.").

Finally, with respect to Plaintiffs' motion for costs, such a request must first be filed with the Clerk of Court. Buchanan v. Kropp, No. CIV. A. 91-3134, 1994 WL 34174, *5 (E.D. Pa. Feb. 8, 1994). Accordingly, this Court will deny Plaintiffs' application for costs without prejudice to it being filed with the Clerk of Court.

In summary, Plaintiffs' Motion for Attorneys' Fees will

be granted as to the following:

First Trial	**Hours**	**Rate**	
Mark B. Frost, Esquire (In Court)	65	x $225.00	= $14,625.00
Mark B. Frost, Esquire (Office Hours)(415.65 - 25.8)	389.85	x $200.00	= $77,970.00
Gregg L. Zeff, Esquire (In Court)	65	x $200.00	= $13,000.00
Gregg L. Zeff, Esquire (Office Hours)(559.30 - 32.4)	526.90	x $175.00	= $92,207.50
Josephine Carabello Patti, Esq. (Office Hours)	127.65	x $125.00	= $15,956.25

Second Trial	**Hours**	**Rate**	
Mark B. Frost, Esquire (In Court)	73.5	x $275.00	= $20,212.50
Mark B. Frost, Esquire (Office Hours)	522.40	x $225.00	=$117,540.00
Gregg L. Zeff, Esquire (In Court)	73.5	x $205.00	= $15,067.50
Gregg L. Zeff, Esquire (Office Hours)	325.7	x $180.00	= $58,626.00
Josephine Carabello Patti, Esq. (Office Hours) (51 - 1)	50	x $150.00	= $7,500.00

Supplemental Bill	**Hours**	**Rate**	
Mark B. Frost, Esquire	1.00	x $225.00	= $225.00
Gregg L. Zeff, Esquire	27.75	x $180.00	= $3,915.00
Josephine Carabello Patti, Esq.	4.1	x $150.00	= $615.00

Expert Fees - Bunin & Associates

Reports on Gentner & Stevenson for First Trial	$1,800.00
Updated Report Fees of 11/97	800.00
Second Trial testimony and	

Updated Report Fee for Reports of 9/11/98 & 9/16/98	$1,500.00
TOTAL	**$441,559.75**

Based on the above, this Court will grant Plaintiffs' Motion for Attorney's Fees in the amount of $441,559.75. An order will follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRED GENTNER AND ROBERT STEVENSON, Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 94-7443
CHEYNEY UNIVERSITY OF PENNSYLVANIA, Defendant.	:	

ORDER

AND NOW, this 1st day of November, 1999, upon consideration of Plaintiffs' Motion for Attorney's Fees and Costs, and all responses thereto, it is hereby ORDERED that Plaintiffs' Motion is GRANTED in part and DENIED in part as follows:

1. Plaintiffs' Motion for Attorney's Fees is GRANTED in the amount of $441,559.75; and

2. Plaintiffs' Motion for Costs is DENIED without prejudice to it being filed with the Clerk of Court.

BY THE COURT:

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ROBERT F. KELLY, J.